In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1016

JOHN RAYMOND JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of the failure to obey an order to report for induction, in violation of 50 U.S.C. App. 462(a)(2). On August 25, 1969, he was sentenced to three years' imprisonment, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2) (3 R. 323).[1]

The record shows that petitioner, who was born in 1944, was granted student deferments between 1962

[1] "R." preceded by the volume number refers to the three numbered volumes of the court of appeals' record presently on file with the Clerk of this Court. The transcript of trial is contained in volumes 2 and 3.

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and 1967 (SS File 4–7, 11, 38, 41, 48, 52).[1] In October 1967 the local board was advised by the University of California that petitioner had graduated in September 1967 (SS File 67). In December 1967, the board classified petitioner 1–A (SS File 11). Although advised of this classification and of his right to appeal (SS File 68, 69), he did not appeal. In January 1968, he was ordered to report for induction on February 7, 1968 (SS File 11, 70), but did not report (SS File 73–74, Pet. 3). In October 1968, approximately eight months after failing to report for induction, petitioner wrote his draft board the letter set forth in the opinion below (Pet. App. A3) explaining why he had refused to submit to induction and asserting his belief that the selective service system was illegitimate.

In a pretrial motion and in argument, petitioner's counsel asserted in part that the filing of claims and the taking of appeals through the Selective Service System "is basically a violation of the traditional separation of the Church and State and resulted in an impairment of the right to exercise freedom of religion" (2 R. 72–73). Petitioner did not, however, endeavor to present any evidence that he was a conscientious objector. Nor did he raise that issue originally on appeal. His defenses, and arguments on appeal, were that he was called out of turn and that

[1] "SS File" refers to Government Exhibit 1 A which consists of those portions of petitioner's selective service file which the court ruled were admissible (2 R. 65–71, Pet. 22). The complete file is designated Government Exhibit 1.

there was insufficient evidence to show receipt of the notice to report for induction.[2]

After the decision in *Welsh* v. *United States*, 398 U.S. 333, petitioner asked leave to file an additional brief in the court of appeals, asserting that his conviction should be set aside because he had been deterred from filing a claim for classification as a conscientious objector by the belief that a non-religious conscientious objector could not obtain exemption from military service. The denial of this motion is the main issue raised by petitioner in this petition.

The court below was correct in denying the motion because petitioner's conscientious objector claim at that late stage could not affect the validity of his conviction. Petitioner made no claim to his draft board prior to his failure to report. He cannot therefore complain of the failure of the local board to give him a classification which he did not request. *United States*

[2] Petitioner's parents lived in Glendale, California; he gave the local board their address as the permanent address at which he could be reached (SS File 2–5). In July 1967, when a dean of students at the Berkeley campus of the University of California advised the board of petitioner's status as a student, the report, co-signed by petitioner, indicated that petitioner was then living at an address in Berkeley which was both his campus and permanent address (SS File 63). Since the college, rather than petitioner, had submitted this report, the board did not consider the address given in the report as effecting an official change of address for petitioner (2 R. 84–85). The December 1967–January 1968 letters and induction notice were mailed by the local board to petitioner at the Glendale address (2 R. 88, 99, 101–102). None of these communications were ever returned to the board as being undeliverable (2 R. 79, 102).

v. *Collins*, 426 F. 2d 765 (C.A. 5), No. 493, this Term, certiorari denied, November 16, 1970; *Lockhart* v. *United States*, 420 F. 2d 1143, 1146 (C.A. 9); see *McKart* v. *United States*, 395 U.S. 185, 198, note 16; *Tongue* v. *United States*, 407 F. 2d 774 (C.A. 4), certiorari denied 395 U.S. 967.

In addition, a consistent line of decisions holds that local boards are without power to consider claims of improper classification tendered for the first time *after* the acts constituting the crime of wilful refusal to obey an order to report for induction have been committed. *E.g.*, *United States* v. *Stoppelman*, 406 F. 2d 127 (C.A. 1), certiorari denied, 395 U.S. 981; *Palmer* v. *United States*, 401 F. 2d 226 (C.A. 9); *United States* v. *Smogor*, 411 F. 2d 501 (C.A. 7), certiorari denied, 396 U.S. 972; *Brown* v. *United States*, 409 F. 2d 1354 (C.A. 9); *United States* v. *Powers*, 413 F. 2d 834 (C.A. 1), certiorari denied, 396 U.S. 923.[4]

Petitioner contends that he did not make a claim of conscientious objection earlier because he justifiably believed, until this Court's decision in *Welsh*, that he could not successfully assert such a claim on the basis of his non-religious scruples. However, the possibility of at least some kinds of non-religious conscientious objection was apparent after this Court's 1965 deci-

[4] Both *United States* v. *Shields*, government's petition for certiorari pending, No. 72, this Term, and *Wroblewski* v. *United States*, No. 5956, this Term, involve situations where defendants tendered conscientious objector claims for the first time at trial. In this case, the claim was first raised at a late stage in the appeal.

sion in *United States* v. *Seeger*, 380 U.S. 163, upon which petitioner had relied in part in his pretrial motion to dismiss (1 R. 44–45).*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1970.

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* In *United States* v. *Shields*, supra, the defendant contended that he was justified in not making his claim of *selective* conscientious objection prior to trial because the availability of classification on that basis was not apparent until the decision in *United States* v. *Sisson*, 297 F. Supp. 902 (D. Mass.), appeal dismissed for want of jurisdiction, 399 U.S. 267. Even if the failure to make an earlier claim of selective conscientious objection is excusable because of later legal developments, the failure to make the claim of total conscientious objection, after *Seeger* v. *United States*, *supra*, had been decided, is not similarly excusable.

U.S. GOVERNMENT PRINTING OFFICE: 1970